OH JIN GHEE & ORS. v. ABDUL HAMEED & ORS.

[Orig. Civ. Juris. (Thomson, J.) May 9, 1952]

[Ipoh — Civil Suit No. 394 of 1951]

Probate and Administration Enactment, ss. 4, 51 and 93(ii) — Appointment of a representative under English R.S.C., O.16 r.46 — Whether an administrator ad litem can be appointed on an application by way of motion.

This was an application made by way of motion to appoint a representative under English R.S.C., 0.16 r.46 to represent the estate of a deceased defendant or, alternatively, to appoint an administrator **ad litem** to the estate of the deceased under section 51 of the Probate and Administration Enactment. There was no controversy in the matter but was rather one where the guidance of the Court was sought in view of certain doubt that existed.

Held, (1) that by section 357 of the Civil Procedure Code, where a defendant dies before decree his "legal representative" can on application to the Court be made defendant in his stead and by section 93(ii) of the Probate and Administration Enactment the right to prosecute or defend any suit (other than in respect of certain specified causes of action) existing in favour of or against any person at the time of his decease survives to and against his executor or administrator as the case may be who by section 4 of the same Enactment is declared to be "his legal representative for all purposes". By section 51 of the Probate and Administration Enactment where it is necessary that the representative of a deceased person should be made a party to a pending suit and the person otherwise entitled to administration is unable or is unwilling to act, administration limited for the purposes of the suit may be granted to the nominee of any party to it; (2) that an administrator **ad litem** cannot be appointed by way of motion. An application for Letters of Administration must be made by way of petition under section 72 of the Probate and Administration Enactment.

Case referred to :—

(1) *Yong Joo Lim v. Lam Taip Nyong* (1939) M.L.J. 222 (1939) F.M.S.L.R. 39.

MOTION.

S. K. Das for the applicants.

Cur. Adv. Vult.

Thomson, J. : — This is an application made by way of motion to appoint a representative under R.S.C., O.16 r.46 to represent the estate of a deceased defendant or, alternatively, to appoint an administrator *ad litem* to the estate of the deceased under section 51 of the Probate and Administration Enactment. There is no controversy in the matter but it is rather one where the guidance of the Court is sought in view of certain doubts that exist.

The facts, in so far as they are material, are that on 12th April, 1951, the present applicants as plaintiffs commenced proceedings relating to certain lands against the five defendants. Four of these defendants were served with the proceedings but entered no appearance. The 5th defendant entered appearance and was ordered to file a defence. He failed to do so within the prescribed time but before the plaintiffs could proceed to judgment he died. His next-of-kin, his widow, though informed of the proceedings by the plaintiffs' solicitors, has taken no steps to take out representation to his estate. It is in these circumstances that the applicants have invoked the assistance of the Court.

By R.S.C., O.16 r.46 it is provided in England that where a deceased person who was interested in any matter before the Court has no legal personal representative the Court may appoint some person to represent his estate for all the purposes of the matter in question. Mr. S. K. Das who appeared for the applicants, and who presented his case with his invariable helpfulness, submitted that though there was no corresponding provision in our local legislation the Court had jurisdiction to act under the English rule. His argument was that the question of whether the Court should so act was a matter of jurisdiction and not a matter of procedure and that by virtue of paragraph 1 of the Second Schedule to the Courts Ordinance the Court had jurisdiction and authority of a like nature and extent as are exercised by the Chancery and King's Bench Divisions of the High Court of Justice in England. In support of his argument he cited the local case of *Yong Joo Lim v. Lam Taip Nyong*[1] where it was held by Terrell, J., under the corresponding section of the old Courts Enactment the Court had jurisdiction to make a representation order of the sort that might be made in the Chancery Division of the High Court in England by R.S.C. O.16.

In so far as it is applicable to the present case I am, of course, bound by the decision in *Yong Joo Lim's* case. The reasoning, however, on which that decision was based is very far from clear. It was a case where the executors of a deceased person had taken out an originating summons under section 469 of the Civil Procedure Code for construction of the testator's will. There were a number of beneficiaries falling into a number of classes and although all the beneficiaries were not before the Court at least one member of each class of beneficiaries was before it. It was desired that the beneficiaries not before the Court should be each bound according to his class by any order made and accordingly the applicants asked that representation orders should be made appointing each of the beneficiaries before the Court to be representative of

his class. Terrell, J., having set out these considerations proceeded to observe: "Unfortunately the Civil Procedure Code makes no provision for a representation order." He then proceeded to hold that section 49(i)(a) of the then Courts Enactment which gave this Court the same jurisdiction as that exercised by the High Court in England conferred upon this Court power to make representation orders and he accordingly made the orders prayed.

On this it is clear that Terrell, J., was mainly influenced in arriving at the result at which he ultimately did arrive by the consideration that what he was being asked to do was something for which there was no specific provision in the local legislation. Whether that consideration led him to the conclusion that he had jurisdiction to make the order asked for or whether having come to that conclusion independently, it induced him to exercise his jurisdiction in the way he did exercise it is, however, unnecessary to decide for the purposes of the present application for there is ample provision in our local legislation to deal with the difficulty in which the present applicants find themselves.

By section 357 of the Civil Procedure Code, where a defendant dies before decree his "legal representative" can on application to the Court be made defendant in his stead and by section 93(ii) of the Probate and Administration Enactment the right to prosecute or defend any suit (other than in respect of certain specified causes of action) existing in favour of or against any person at the time of his decease survives to and against his executor or administrator as the case may be who by section 4 of the same Enactment is declared to be "his legal representative for all purposes". By section 51 of the Probate and Administration Enactment where it is necessary that the representative of a deceased person should be made a party to a pending suit and the person otherwise entitled to administration is unable or is unwilling to act, administration limited for the purposes of the suit may be granted to the nominee of any party to it.

These provisions, it seems to me, deal with the matter so completely that it would be unwise to go outside them even if, which I very much doubt, it were theoretically open to do so. By section 357 of the Code, if a right of action survives at all, it is the legal representative who must be made defendant. Section 93 of the Probate Enactment is the only provision in the local law by virtue of which a right of action does survive and by the terms of that section it only survives against the executor or administrator of the deceased. A further connecting link between these two sections, if it be necessary, is to be found in section 4 of the Probate Enactment for if the executor or administrator of a deceased person is his legal representative "for all purposes" it follows on the ordinary canons of construction (though not, perhaps, according to the strict rules of formal logic) that no person who is not an executor or administrator can be his legal representative for any purpose. *Expressio unius est exclusio alterius.* Finally, section 51 of the Probate Enactment provides for the appointment of an administrator *ad litem* with full powers of representation in relation to the litigation in connection with which he is appointed where the person who would otherwise be entitled to administration is unable or unwilling to act. In the light of these provisions what the present applicants are entitled to, and all they are entitled to, is to have their nominee appointed administrator *ad litem* in terms of section 51 of the Probate Enactment.

I would add at this stage that I am fortified in the result at which I have thus arrived by two considerations. One is that what I have said is in accordance with what I understand to be the practice of the Courts in India from where, and not from England, the relevant portions of our local law have been imported. The other is that it is a principle of our local law that administrators should be much more closely under the control of the Court than is the case in England (see for example section 94(iii) of the Probate Enactment) and in the light of this it would be clearly undesirable in the absence of express statutory authority to go beyond the strict limits of the law in permitting any person to take steps which might affect the value of a deceased person's estate particularly when that person has died intestate.

One further point remains to be decided and that is whether an administrator *ad litem* can be appointed on an application made by way of motion. The answer clearly is that he cannot. Section 72 of the Probate and Administration Enactment clearly states that "application for Letters of Administration shall be made by way of petition" stating the various matters set out in the section. The terms of that section are general and mandatory and I can see no means by which they can be avoided.

The present application is accordingly dismissed with costs.

Application dismissed.